UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

ELODIA GUZMAN, Complainant, v. YAKIMA FRUIT AND COLD STORAGE, Respondent.	)	8 U.S.C. § 1324b Proceeding Case No. 20B00103
ELODIA GUZMAN, Complainant, v. SRTC OF VANCOUVER, INC., Respondent.	)	8 U.S.C. § 1324b Proceeding Case No. 20B00104 **MARVIN H. MORSE** **Administrative Law Judge**

ERRATA
(April 24, 2001)

The Order Denying Respondent's Motion to Dismiss on Citizenship, Granting on National Origin, and Denying Motion for Summary Decision on Citizenship Status Claim, issued on April 12, 2001, is corrected as follows:

At section II, Motion to Dismiss National Origin Claim Granted, the citation 8 U.S.C. § 1324b(2) should read 8 U.S.C. § 1324b(a)(2).

The first paragraph in section III, Motion to Dismiss Citizenship Status Claim Denied, should read:

> Yakima argues that citizenship discrimination was raised for the first time in Guzman's complaint dated August 20, 2000, and not in the charge filed with OSC. The claimed acts of citizenship status discrimination were alleged to have occurred in August and/or September 1999, more than 180 days before they were first raised in the OCAHO Complaint. 8 U.S.C. § 1324b(d)(3), 28 C.F.R. § 68.4(a). Yakima contends that the ALJ lacks jurisdiction to hear a claim of

citizenship discrimination that was not contained in the OSC charge.

At the second paragraph in section III, Motion to Dismiss Citizenship Status Claim Denied, the correct citations for *Ekunsumi v. Hyatt Regency Hotel of Cincinnati* and *Westendorf v. Brown & Root, Inc*. are,

> *Ekunsumi v. Hyatt Regency Hotel of Cincinnati,* 1 OCAHO no. 128, 866, at 871-74 (1990); *Westendorf v. Brown and Root, Inc.*,3 OCAHO no. 477, 801, at 806-07 (1992).

SO ORDERED.

Dated and entered this 24th day of April, 2001.

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Marvin H. Morse
Administrative Law Judge

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ELODIA GUZMAN, Complainant, v. SRTC OF VANCOUVER, INC, Respondent.	)))))))	8 U.S.C. § 1324b Proceeding Case No. 20B00104 **MARVIN H. MORSE** **Administrative Law Judge**

ORDER DENYING MOTION TO DISMISS ON CITIZENSHIP, GRANTING ON NATIONAL ORIGIN, AND DENYING MOTION FOR SUMMARY DECISION ON CITIZENSHIP STATUS CLAIM
(April 12, 2001)

I. BACKGROUND AND PROCEDURAL HISTORY

A. Procedural History

On January 19, 2000, Columbia Legal Services (CLS) filed a charge against Yakima Fruit & Cold Storage (Yakima) and SRTC of Vancouver, Inc. (SRTC) on behalf of Elodia Guzman (Guzman) with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), alleging unfair immigration related employment practices in violation of 8 U.S.C. § 1324b. The charge form specified only "document abuse" as the alleged unfair immigration related employment practice.

CLS accompanied the charge form with a letter alleging that: (1) Yakima and SRTC refused to accept Guzman's facially valid work authorization, that (2) Yakima impermissibly questioned Guzman regarding her immigration status, and (3) that Yakima, motivated by discrimination based on national origin, refused to hire Guzman and directed SRTC to terminate her job assignment at the Yakima warehouse in Wapato, WA.

By letter dated May 26, 2000, OSC informed Guzman that the initial 120-day period to investigate the charge had expired, that OSC had not made a reasonable cause finding, and that the investigation would be complete within 90 days. OSC informed Guzman that she may file her own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

By letter dated August 18, 2000, OSC informed Guzman, Yakima and SRTC that it determined that there was insufficient evidence of reasonable cause to believe that Guzman had been discriminated against.

On September 6, 2000, Guzman filed an OCAHO complaint against Yakima, alleging that she had been discriminated against because of her citizenship status, that Yakima refused to accept the documents she presented to show she can work in the United States. [Complaint at 6, #16]. Guzman's claim of discriminatory conduct is substantially the same as in the charge: that Yakima refused to accept her facially valid documents, that Yakima asked her about her immigration status, and that Yakima refused to hire her and directed SRTC to terminate her assignment at Yakima's Wapato warehouse. [Complaint at 3-4, #13, 5, #14, and 6-7 #17]. Complainant alleged that she was not hired and that she was fired due to her citizenship status. [Complaint at 3-4, #13, 5, #14, and 6-7 #17].

On September 6, 2000, Guzman filed an OCAHO complaint against SRTC, alleging that she had been discriminated against because of her citizenship status. [Complaint at 2, #9]. Guzman alleged she was fired because of her citizenship status, claiming that Yakima contracted with SRTC to provide Yakima's work force, and that Yakima directed SRTC to fire her because Yakima did not accept the validity of her facially valid documents. [Complaint at 5, # 14]. Guzman alleged that SRTC refused to accept the documents she presented to show she can work in the United States, claiming that SRTC called Social Security to check the validity of her social security number and asked her to provide verification of her number. [Complaint at 6-7, #16]. Finally, Complainant alleged that SRTC asked her for "too many or wrong" documents than required to show that she is authorized to work in the United States. [Complaint at 7, #17].

On October 16, 2000, Yakima timely filed an answer which denied [Answer at ¶ 9], that Guzman was knowingly and intentionally not hired because of her citizenship status, contending instead that she was not hired because there were no openings and no work was available. [Answer at ¶¶ 13, 13a]. Yakima denied that it refused to accept Guzman's documents or that she was asked about her

immigration status, that Guzman was qualified for the job, that Yakima was looking for workers, and that the job remained open and it continued taking applications from people with Complainant's qualifications. [Answer at ¶¶ 13b-13d]. Yakima denied that it fired Guzman because of her citizenship status, or that it directed SRTC to fire her because Yakima did not accept the validity of her work authorization, and that Guzman was qualified for the job but was fired. [Answer at ¶¶ 14-14d]. Yakima denied that it refused to accept the documents that Guzman presented to show that she can work in the United States, that it refused to accept documents even though they appeared facially valid, and that Guzman was asked questions about her immigration status. [Answer at ¶¶ 16-16a]. On November 27, 2000, Yakima filed an Amended Answer which denied that Guzman suffered the unfair immigration related practice of document abuse, that an unfair practice occurred on or around August 19, 1999, that an unfair immigration-related employment practice occurred at the Yakima warehouse in Yakima, WA, and denied the conduct described in the letter accompanying the charge. [Amended Answer at ¶¶ 4, 6, 7, and 9].

On October 3, 2000, SRTC filed an Answer which denied that Complainant was discriminated against because of her citizenship status [Answer at ¶ 9], that Guzman was knowingly and intentionally fired because of her citizenship status [Answer at ¶ 14-14a], that Guzman was fired by SRTC or that Yakima directed SRTC to fire Guzman, but stated that Yakima requested that SRTC not assign Guzman to its facility after September 17, 1999. [Answer at ¶ 14b-d]. SRTC denied that Guzman was qualified but was fired, claiming rather that she was reassigned to another SRTC customer and refused the reassignment. SRTC denied that Guzman seeks to be re-hired. [Answer at ¶¶ 14e-f]. SRTC denied that it refused to accept Guzman's documents, stating that it accepted her documents and offered her job assignments. SRTC also agreed that it did verify Guzman's Social Security Number, consistent with its policy and practice for all employees. [Answer at ¶¶ 16-16a]. SRTC denied that it asked Guzman for too many or wrong documents. [Answer at ¶¶ 17-17a].

By my order dated December 18, 2000, the Yakima and SRTC cases were consolidated. *Guzman v. Yakima Fruit and Cold Storage et al.*, 9 OCAHO no. 1063 (2000).

On December 19, 2000, Yakima filed separate motions to dismiss the complaint and for summary judgment, accompanied by a single memorandum in support of both motions. Yakima's Motion to Dismiss contends that the national origin claim should be dismissed because Yakima employed 15 or more employees, a jurisdictional defect under 8 U.S.C. § 1324b(a)(2)(B), and that the claim of citizenship status discrimination should be dismissed because the claim was not included in the initial charge.

OSC moved for leave to file and subsequently filed a Brief as Amicus Curiae opposing Respondent's motions, limited to two issues: (1) determining a complainant's evidentiary burden once a respondent has articulated a non-discriminatory reason for its employment actions in a proceeding

involving indirect or circumstantial evidence of discrimination and (2) whether a complainant's failure to specifically allege citizenship status discrimination in the charge filed with OSC bars the Administrative Law Judge (ALJ) from hearing a complaint based on citizenship status discrimination.[1]

On January 25, 2001, Complainant filed her response to Yakima's motions for dismissal and summary judgment.

On February 5, 2001, Yakima filed its Reply Memorandum In Support of Motion to Dismiss and Motion for Summary Judgment.

On February 7, 2001, Complainant filed a Motion for Leave to Correct [Yakima's] Misstatements of Facts.

During a prehearing conference on March 5, 2001, counsel presented oral arguments on Yakima's Motion to Dismiss and Motion for Summary Judgment. Upon my request, Yakima, by counsel, filed a written summary of arguments in support on March 23, 2001, and on March 26, 2001, Guzman, by counsel, filed a written summary of arguments in opposition.

B. Factual Contentions Asserted on Motion Practice

Yakima contends that for economic reasons it discontinued processing apples in its Yakima facility in early 1999. That operation was the oldest of two facilities, its equipment outmoded and inefficient. When Yakima ceased processing and warehouse work in Yakima, the approximately 80 warehouse and processing workers at the facility were transferred to Yakima's second warehouse and processing facility in Wapato as work became available and if they chose to work at the facility. However, the transfer process was not immediate and numerous workers were placed on layoff and could not be recalled until work became available. Yakima recalled the laid-off workers rather than hire new workers. The last Yakima workers were recalled in early September 1999.

During the winter and spring, 1999, the Immigration and Naturalization Service (INS) conducted sweeps of processing plants in the Yakima Valley. The INS organized and conducted meetings in which warehouse and processing plant representatives were cautioned about the consequences of hiring undocumented workers. Employers were shown examples of falsified documents and it was suggested that all social security numbers of current and potential workers be cross checked with the Social Security Administration to avoid sanctions and fines that might result

[1]OSC filed its motion for leave to file the Brief as Amicus Curiae on January 5, 2001, I granted the motion at a prehearing conference on January 10, 2001, and OSC filed its brief on January 19, 2001.

from non-compliance with the prohibition against employing undocumented workers.

Yakima had hired Guzman on May 2, 1994, and she worked continuously (subject to seasonal work fluctuations) as a warehouse worker. In June 1999, Yakima realized her work authorization had expired or was about to expire, and Yakima personnel told Guzman that she must obtain current authorization. Guzman presented Yakima management with a copy of a Notice of Hearing in Removal Proceedings, which raised a concern about her ability to legally continue to work. As with other employees in similar situations, Guzman was told that if within two weeks she was unable to provide proof of work authorization, her employment would be terminated; she would have to reapply for further employment.

Guzman returned two months later with new documentation, by which time, Yakima had ended the fruit processing season. Work was not steady, and management would call warehouse workers back to work from lay-off as needed for re-packing inventory and specialty packing. According to Bill Frank (Frank), Yakima's General Manager, January 1999 was the last time Yakima directly hired new employees.

In late August 1999, Yakima decided the demand for apples from the 1999 apple crop caused a need to temporarily add a night crew at Wapato. Yakima elected to hire temporary workers, through SRTC. SRTC hired and assigned employees for the temporary shift. On the first night, more than 200 people arrived for a night shift that only needed 80 people. Yakima's packing line supervisors worked with SRTC to determine who were the best workers. Yakima would advise SRTC if an employee was not performing adequately. SRTC would then assign to Yakima another employee.

During the first two months of the shift, 48 employees did not perform satisfactorily. After approximately four days of observing Guzman, Yakima management concluded her work was not satisfactory. Guzman had previously been sorting red delicious apples but was now required to sort golden delicious apples on the new second shift. According to Frank, there are different parameters for sorting and packing golden than for red due to bruising, and Guzman was having problems performing the more difficult task of sorting golden delicious apples.

The night shift was discontinued the second week of January 2000, as a result of decreased demand for apples.

After leaving the Yakima assignment, SRTC reassigned Guzman to work at Del Monte Corp.; however, she did not report to that assignment nor did she contact SRTC after the re-assignment.

Although it is undisputed that Guzman was employed by Yakima from 1994 to1999, during

which time she received regular salary increases and received no warnings or discipline regarding her work performance, Guzman offers a different version of the critical facts.

In early June 1999, anticipating that Guzman's work authorization would expire on June 10, 1999, Yakima management informed her that she would need to have her work authorization renewed. In contrast to Yakima's claim that Guzman was told she would need to return with the work authorization within two weeks, she claims Yakima did not specify any time limit to her ability to return to work with new authorization.

Shortly after June 1999, when Guzman returned to Yakima, she showed them an April 28, 1999 hearing notice relating to her application for registry.[2] According to the Declaration of Marie Higuera (Higuera), an attorney in Washington State, Higuera assisted Guzman in filing an application to become a permanent resident under the registry provisions of the Immigration and Nationality Act. Pursuant to the application, the INS gave Guzman temporary work authorization which expired June 1999. The Seattle Immigration Court, by notice dated April 28, 1999, set a hearing for August 12, 1999, to adjudicate Guzman's application for adjustment of status to lawful permanent residency under the registry provisions. Higuera stated that prior to the hearing she assisted Guzman in applying for renewal of work authorization, which was renewed on August 11, 1999. On August 12, 1999, the hearing was continued to August 18, 1999, on which date the Immigration Judge signed an order granting Guzman permanent residence status.

In mid-August 1999, Guzman returned to Yakima with a new work authorization and showed Frank the new authorization. He refused to look at the document, but asked why she had needed to go to Immigration Court. Frank's notes and deposition regarding the conversation show that he was under the impression that Complainant's immigration hearing was "the result of [Complainant] giving false information to INS." [Frank Dep. At 59:20-66:20 and Ex. 6 and 7 thereto]. Frank admits that this conclusion was based on speculation. *Id*. A letter written by Frank about the August conversation also shows that Frank had the erroneous impression that Guzman's April 28, 1999 hearing notice meant she was working with invalid identification, and that she knew six weeks before notifying Yakima that the INS had discovered she was working with invalid identification. [Frank. Dep. at 96:1-69:4 and Ex. 8 thereto]. Frank also admits that this conclusion was unfounded. *Id*. However, Frank also explained that Yakima had had problems with documents Guzman had provided in the past, such as different birth dates on two different documents and he believed her social security number changed twice. [Frank Dep. at 65:22-66:5].

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[2]Under 8 U.S.C. §1259, registry is available to aliens who entered the United States prior to January 1, 1972. Registry is the creation of a record of lawful admission for permanent residence when the record is not otherwise available.

At the August meeting, Frank told Guzman that there was no work available at that time, but that he would put her name on a list and call her when work was available. Although Frank was already contemplating adding the new shift at Wapato, he did not mention that possibility to Guzman.

Shortly after the August meeting, Guzman told a Yakima office worker she had obtained her permanent residency, and showed the worker the order granting her permanent residence status. The worker made a copy of the order and told Guzman it would be given to Frank.

On September 8 and 9, Yakima recalled to work at least two warehouse workers who had been laid off. Guzman claims Yakima recalled these workers rather than Guzman even though they had been hired after her 1994 date of hire. Guzman also claims that Yakima did not call her about the available work on the second shift after the company contracted with SRTC on August 25, 1999 to supply the workers for the second shift.

On September 13, 1999, Guzman applied for work through SRTC, and SRTC required her to produce copies of her social security card and Washington State photo identification in addition to her work authorization card. The next day, SRTC assigned Guzman to work at Yakima's second shift. SRTC brought 200 workers to the shift when Yakima needed only 80 workers. Yakima selected the 80 workers who would stay, determined their job assignments, established the work hours, set the rate of pay, trained the workers, supervised them, and retained the authority to terminate the workers' assignments at Yakima. Yakima also assigned a number of its permanent workers to the second shift.[3]

Guzman worked at Yakima for approximately four days in September 1999, receiving no written or oral warnings or other discipline regarding her performance. After the fourth day, SRTC called Guzman at home and told her that she would need to provide additional verification of her social security number before she could continue to work at Yakima. Guzman went to the Social Security Administration office and back to the SRTC office three times to get verification that SRTC would accept. After the third trip to SRTC, SRTC told Guzman to take the Social Security computer printout to the Yakima warehouse, which she did, and she was told to report to work the following day.

The next day when Guzman reported to work, an SRTC manager told her that there was no work for her. The manager refused Guzman's request for an explanation for the termination of her job, and then the manager called the SRTC office when Guzman repeated her request. The manager put Guzman on the phone with the SRTC office, and the person on the phone told Guzman that she could no longer work at Yakima because the company had fired her.

Although Frank asserts that Guzman was replaced because her job performance was not

[3]At this juncture, it is presumed that Guzman was one of the 80 workers chosen to work.

optimal or satisfactory, SRTC (in a response to an interrogatory posed by Guzman) denies that Guzman's work performance was ever unsatisfactory.

Approximately two days after Guzman's job at Yakima was terminated, SRTC called her about working at Del Monte. She asserts she was interested in the job, but could not obtain transportation because the work hours were 11 p.m to 7 a.m., the Del Monte warehouse was fifteen miles from her home; the Del Monte job paid $5.70 an hour and she had been earning $8.00 an hour at Yakima.

II. MOTION TO DISMISS NATIONAL ORIGIN CLAIM GRANTED

The cases are legion to the effect that ALJ jurisdiction over national origin discrimination claims is limited to cases involving employers of more than three and fewer than fourteen employees. 8 U.S.C. § 1324b (2). *See e.g., Akinwande v. Erol's Inc.*, 1 OCAHO no.144, 1023, at 1025-26 (1990).[4] Yakima has provided payroll information to the effect that Yakima employed more than fourteen employees at all times material to this case. Yakima's motion to dismiss the claim of national origin discrimination is granted.[5]

III. MOTION TO DISMISS CITIZENSHIP STATUS CLAIM DENIED

Yakima argues that citizenship discrimination was raised for the first time in Guzman's complaint dated August 20, 2000, and not in the charge filed with OSC, the claimed citizenship status discrimination was alleged to have occurred in August and/or September 1999, more than 180 days before they were first raised in the OCAHO Complaint. 8 U.S.C. § 1324b(c)(3), 28 C.F.R. § 68.4(a). Yakima contends that the ALJ lacks jurisdiction to hear a claim of citizenship discrimination that was not contained in the OSC charge.

CLS did not check the box for citizenship status discrimination on the OSC charge form.

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[4] OCAHO precedents appearing in bound volumes or on OCAHO's website are cited according to the following format:

Ruan v. United States Navy, 8 OCAHO no. 1046, 714, at 716 (2000).

In addition to availability of printed decisions through depository libraries, OCAHO decisions are available on Westlaw (database identifier FIM-OCAHO), or on OCAHO's website (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

[5] The Second Prehearing Conference Report and Order, Including Order Granting Motion to File Brief Amicus Curiae (January 10, 2001), confirmed the understanding of counsel and the bench that there remains no issue in this case of national origin discrimination.

However, the argument that a complainant is limited to the allegations checked off on the charge form submitted to OSC conflicts with OCAHO precedent. At least two decisions make clear that failure to check a box on a charge form indicating a particular form of discrimination does not preclude a complainant from later alleging that same basis for discrimination in a complaint. *Ekunsumi v. Hyatt Regency Hotel of Cincinnati*, 1 OCAHO no. 128, 837 (1990); *Westendorf v. Brown & Root, Inc*., 3 OCAHO no. 477, 806-07 (1992). In each case, the ALJ rejected the argument that the charging party's failure to allege a specific form of discrimination in the charge filed with OSC precluded the inclusion of the allegation in the complaint. *Id*. To the same effect, *see also, Mengarpuan v. Asbury Methodist Village*, 4 OCAHO no. 612, 236 at 241-42 (1994).

While *Ekunsumi* and *Westendorf* complainants involved *pro se* status, the decisions in both cases turn on the relationship between the allegations contained in the charge and the allegations in the complaint, and not on whether complainant is *pro se*. "Whether an allegation is 'like or reasonably related' to allegations contained in the charge depends on whether the original investigation would have encompassed the additional claim." *Westendorf*, 3 OCAHO no. 477 at 806-07 (*citing Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1476 (9th Cir. 1989)). As OSC noted in its *amicus* brief, the complainant's allegation of discharge because of citizenship status (*Ekunsumi*) and national origin discrimination (*Westendorf*) fell within the scope of an OSC investigation that could reasonably have been expected to grow out of the respective charges.

The predicate for the Guzman charge of document abuse, 8 U.S.C. § 1324b(a)(6), provides that,

> A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

Significantly, prior to the 1990 enactment of subsection 1324b(a)(6), OCAHO case law established that conduct now characterized as document abuse in violation of subsection (6) constituted prohibited immigration-related workplace discrimination. *See Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189 (1990); *United States v. Marcel Watch Corp*., 1 OCAHO no. 143 (1990). These cases found citizenship status discrimination where employers requested that individuals present additional or specific proof of employment authorization either as a prerequisite to or after hire. Citizenship status discrimination and document abuse are intimately related acts. Subsection 1324b(a)(6) simply codified the case law of *Jones* and *Marcel Watch*, encompassing the prohibition against citizenship status discrimination.

The CLS letter that accompanied the charge to OSC alleged that Frank reviewed Guzman's employment authorization document and asked her impermissible questions about her immigration status that included questions concerning the status of her immigration proceeding before he told Guzman no work was available at Yakima. The allegation of citizenship status discrimination in the complaint is implicated by the allegation of document abuse found in the charge. The incident described by CLS implicated both citizenship status discrimination and document abuse because they link the alleged refusal to hire with questions relating to Guzman's citizenship status. I take the CLS letter to be an integral part of the Guzman charge.

The charge, including the CLS letter, served to put Yakima on notice that Guzman was asserting a citizenship status discrimination claim. The pendency of a citizenship status issue was made manifest by OSC's investigatory letter of February 7, 2000 which, broadly addressed "a charge of employment discrimination . . . under 8 U.S.C. § 1324b," inquired, *inter alia*, about citizenship status claims and about Yakima's "policy regarding the hiring of non-citizens." Where, as here, the charge specifies document abuse, and is accompanied by a filing which addresses citizenship issues, I hold that the scope of the allegations and the consequent breadth of the OSC investigation sufficiently embraces citizenship status discrimination to defeat a motion to dismiss for failure to have specifically checked off citizenship status on the OSC charge form.

Consistent with *Westendorf* and *Ekunsumi*, and with the genesis of § 1324b(a)(6), it would be unreasonable and inconsistent with the remedial purpose of the §1324b to dismiss the Complaint. Respondent's motion to dismiss the citizenship status discrimination claim is denied.

IV. SUMMARY DECISION

A. Standards for Summary Decision

Similar to Rule 56(c) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), which provides for the entry of summary judgment in federal courts, OCAHO Rules authorize the ALJ to enter summary decision in favor of a moving party where the pleadings, affidavits, or other record evidence show that there is *no* genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. § 68.38(c). [The OCAHO term "decision" is substituted in this Order for the Fed. R. Civ. P. term "judgment" utilized by Yakima].

Only facts that might affect the outcome of the proceedings are deemed material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact must have a "real basis in the record" to be considered genuine. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986).

Title 28 C.F.R. § 68.38(c) also assigns the relative burdens of production on a motion for summary decision. The moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material fact." *United States v. Davis Nursery, Inc*., 4 OCAHO no. 694, 932 (1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-35 (1986)). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. *Id*. The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial.

The function of summary decision is to avoid an unnecessary evidentiary hearing where there is no genuine issue of material fact, as shown by pleadings, affidavits, discovery, and judicially-noticed matters. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). However, "[w]here a genuine question of material fact is raised, the Administrative Law Judge shall, and in any other case may, set the case for evidentiary hearing." 28 C.F.R. § 68.38(e); *United States v. Valenca Bar & Liquors*, 7 OCAHO no. 995, 1104 (1998). As summarized in *Valenca Bar & Liquors*, on assessing the existence of genuine issues of material fact, all reasonable inferences should be drawn in favor of the non-moving party and if a genuine issue of material fact is gleaned from this analysis, summary decision is not appropriate. *Id*.

B. Discussion

The declarations, sworn statements, interrogatories, and deposition supporting Respondent's motion and Complainant's response clearly establish conflicting issues of material fact.

At a minimum, the following issues of material fact are in dispute:

Frank's deposition asserts Yakima's claim that Guzman was not capable of adequately sorting golden apples when she was sent by SRTC to Yakima's Wapato facility, causing Yakima to direct SRTC to replace Guzman because she could not do the job. However, in response to an interrogatory, SRTC conceded that Guzman's work performance was not unsatisfactory. Both Guzman's declaration and Yakima's answer to an interrogatory state that Guzman never received any written or oral warnings or other discipline for her work performance. Guzman claims that she worked with golden apples during her five years at Yakima and that she was able to sort as fast and accurately as her co-workers.

Yakima's motion, sworn statement by Frank, and sworn statement by Yakima employee Doris Miles, state that in June 1999, Yakima employees told Guzman she needed to renew her work authorization, that Guzman returned later in June to Yakima with a notice of hearing in Immigration Court, that Guzman was informed that she would have two weeks to provide appropriate work authorization, following which she would need to reapply for work at Yakima once she obtained the work authorization. In the event of a lay off, the result of the reapplication would be that Guzman

would be put on a list to be called to work when work was available. In contrast, according to Guzman, Yakima management imposed no time limit on her ability to return to work with proper work authorization.

In June 1999, Guzman showed Yakima her Notice of Hearing in Removal Proceedings dated April 28, 1999, which related to her application for registry regarding adjustment of status to legal permanent resident. In August 1999, Guzman returned to Yakima, showed Frank her work authorization, and was questioned about her immigration case. Frank's deposition admits that the notice caused him to speculate that Guzman's immigration hearing was the result of her giving false information to the INS, that the INS had discovered she was working with invalid work authorization, and that the hearing was in regard to that issue.[6] Frank also stated that Yakima had difficulties with documents Guzman previously provided, such as differing birth dates on different documents, different social security numbers and alien registration cards, prompting his speculation that Guzman had given false information to the INS. These concerns notwithstanding, Frank claimed on deposition that Guzman was not given work in August 1999 because none was available, but said her name would be put on a list to be called when work became available. Frank acknowledged, however, on deposition, that he had been contemplating starting a second shift, knowing work might be available soon, and that he was in negotiation with labor contractors, but he could not remember if he told Guzman of possible employment in the near future. Guzman claims that Yakima called back two laid off warehouse workers who were junior in seniority to her shortly after she presented her new work authorization, and asked to return to work.

Patently, this case to date is redolent of substantial disputes of material fact integral to the claims of citizenship status discrimination and document abuse. Any doubt that Guzman need show more than the issues of material fact demonstrated by the pleadings to defeat the motion was settled by the Ninth Circuit, within whose jurisdiction this case arises, in *Chuang v. University of California, Davis*, 225 F.3d 1115 (2000), relying in part on the recent decision of the Supreme Court of the United States in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. ___, 120 S.Ct. 2097 (2000). *Chuang* trumps Yakima's motion in several respects but it is sufficient at this motion stage before me to rely on the Ninth Circuit's statement in a Title VII case that "a disparate treatment plaintiff [as is Guzman] can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Id.* at 1127. Guzman's case presents all the elements of a prima facie case, as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed 2d 668 (1973). *Reeves* instructs that under the *McDonnell Douglas* framework a prima facie case of discrimination

[6]Frank's impression and speculation was also the result of INS raids of warehouses in Yakima valley and in INS workshops regarding the consequences of employing workers with invalid work authorization.

"combined with sufficient evidence to find that the employer's asserted justification [i.e., the nondiscriminatory explanation for its decision] is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S.Ct. at 2109.

Analogizing to Title VII case law, Guzman's obligation to establish a prima facie case "on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Chuang*, 225 F.3d at 1123 (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). The controverted material facts simply do not permit decision on the pleadings to resolve whether Yakima's proffered explanations are true or are pretextual and false. The *Chuang* court makes clear that "while the plaintiff always retains the burden of persuasion, *Reeves*, 530 U.S. at —, 120 S.Ct. at 2106, he does not necessarily have to introduce 'additional, independent evidence of discrimination' at the pretext stage, *id.* at 2109." *Chuang*, 225 F.3d at 1127. Under *Reeves* and *Chuang* the assertion of the numerous disputed material facts recited above precludes summary decision for Yakima.

V. ORDER

1. Respondent's Motion to Dismiss the National Origin Discrimination Claim is granted.

II. Respondent's Motion to Dismiss the Citizenship Status Discrimination Claim is denied.

III. Respondent's Motion for Summary Judgment [Decision] is denied.

SO ORDERED.

Dated and entered this 12th day of April, 2001.

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Marvin H. Morse
Administrative Law Judge